seem, however, that no injustice would be done by compelling him to elect between the two suits, since this would enable him to try his case in the most advantageous forum, and, if successful there, to levy on the property in the other state by suing on his judgment.[13] Such a rule would spare the defendant much needless expense. The American authorities hold, however, that the question involves not merely the rights of the parties but the right of the court which first gets jurisdiction of a question to retain it. On this ground the second suit is generally enjoined by the court in which the action is first brought.[14] A recent case would seem to be correct on either theory in dissolving a preliminary injunction against a second suit abroad after the domestic suit had been discontinued, since the prior jurisdiction of the local court had thus come to an end, and no serious harassing of the other party was involved.[15] *Jones* v. *Hughes*, 137 N. W. 1023 (Ia.).

THE RELATION OF ESTOPPEL TO AFFIRMATIVE DUTIES IN THE LAW OF TORTS. — That there is no affirmative duty to act has long been one of the axioms of the law of torts. An act may have been attended with many legal consequences, but none were attached to a mere failure to act. Omission was an act in legal fiction only when some duty had been voluntarily assumed.[1] There is a tendency in the law, however, to impose a liability in certain cases for a mere failure to act although arising from no relation thus assumed. The owner of land may be estopped to assert his title [2] or to sue for a trespass [3] if he fails to warn a stranger who is innocently dealing with the land as the property of another. A cor-

[13] White *v.* Caxton Book-binding Co., 10 Civ. Proc. (N. Y.) 146. *Contra*, Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. D. 225.

[14] Fisk *v.* Union Pacific R. Co., 10 Blatchf. (U. S.) 518; French, Trustee, *v.* Hay, 22 Wall. (U. S.) 250; Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238. This rule that the court which first gets possession of the controversy shall retain it is well calculated to prevent coördinate courts from interfering with each other. Although it is perhaps a question of the relation between the courts, rather than between the parties, a court is probably justified in saying that no one over whom it has jurisdiction shall take part in abrogating this rule.

[15] In the principal case the foreign action was brought in an adjoining state. Even where the action is instituted at a place much more distant from the defendant's domicile, this fact alone is not generally regarded as a sufficient ground for an injunction. Fletcher *v.* Rodgers, 27 Wkly. R. 97; Edgell *v.* Clarke, *supra*.

[1] See Eckert *v.* Long Island Ry. Co., 43 N. Y. 502, 505, 508; 1 BEVEN, NEGLIGENCE, 3 ed., 157, note 4; HOLMES, COMMON LAW, 82, 152, 161; 8 HARV. L. REV. 386.

[2] Coram *v.* Palmer, 58 So. 721 (Fla.); Baillarge *v.* Clark, 145 Cal. 589, 79 Pac. 268. See 18 HARV. L. REV. 622. It is submitted that silence, unconnected with previous conduct, can never be a real representation. It seems doubtful if mere presence within hearing of a sale is such previous conduct as to amount to a representation that the sale is valid. Certainly mere absence from a sale coupled with knowledge of the transaction is not a representation, that the sale is valid, to a purchaser who does not know of the real owner's existence, yet here too the courts raise an estoppel. Anderson *v.* Hubble, 93 Ind. 570. If the law chooses to treat such silence as a representation it is making omission an act, — *i. e.*, the law under certain circumstances imposes a duty to speak.

[3] Marvin *v.* Tusch, 98 N. E. 860 (Oh.); Adair *v.* Curry, 106 Mo. App. 578, 80 S. W. 967. *Contra*, Lewis *v.* Patton, 42 Mont. 528, 113 Pac. 745.

poration may be estopped to deny the validity of a contract or conveyance made in its name by a person without authority if its directors or stockholders fail to repudiate it promptly after knowledge.[4] A debtor is liable to the assignee of the debt if he pays the creditor after notice of the assignment.[5] The apparent maker of a forged note may be estopped to deny his signature if, on learning of the deception, he does not at once notify the payee of the forgery.[6] A recent case recognized a similar duty of repudiation as to a forged telegram, although it found absence of reliance on the defendant's disingenuous replies sufficient to prevent an estoppel. *Wiggin* v. *Browning*, 23 Ont. Wkly. Rep. 128 (Divisional Ct.).

It seems impossible to explain these cases except by the imposition of an affirmative duty without any voluntary assumption. By the fraud or negligence of entire strangers, one whose past conduct has been unimpeachable is suddenly required to act or be subjected to legal liability. The law seems ready to adopt another modicum of morality, and it is not difficult to admit the justice of the extension. Theoretically it seems impossible to distinguish the imposition of a duty to rescue a drowning child from the imposition of one to warn a defrauded payee. The reliance by the payee on the purported maker is the only distinguishing element, and that fails since the payee has no right to rely on his silence unless there is a duty to speak. There is, however, the practical difference that the rescue is usually attended with considerable peril [7] or expense, while the warning is generally a matter of little difficulty. And it is doubtful if the law would impose the duty to warn if, in any instance, it were a real burden.[8]

The ordinary remedy for the violation of this affirmative duty has been procured by means of an estoppel.[9] If there is any "material loss" as a consequence of the wrongful silence, there is said to be an estoppel to deny the validity of the entire transaction. The courts properly feel a difficulty in estopping the purported maker as to one-half the note and yet allowing him a denial as to the remainder.[10] The damage for which a

[4] Alexander *v.* Culbertson Irrigation & Waterpower Co., 61 Neb. 333, 85 N. W. 283; Coolidge *v.* Schering, 32 Wash. 557, 73 Pac. 682; Sherman *v.* Fitch, 98 Mass. 59. *Contra*, Oliver *v.* Rahway Ice Co., 64 N. J. Eq. 596, 54 Atl. 460. The facts of these cases will not permit their decisions to be explained by an estoppel to deny the agent's apparent authority.

[5] Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586; Bradley & Currier Co., Limited, *v.* Berns, 51 N. J. Eq. 437, 26 Atl. 908. Here the duty of not paying the creditor is imposed although the debtor has never consented to the assignment. It seems specious to say that he assented to an assignment when he contracted the debt, since the legal result can only be accomplished by the fiction of agency.

[6] Dominion Bank *v.* Ewing, 35 Can. Sup. Ct. 133; Urquhart *v.* Bank of Scotland, 9 Scot. L. Rep. 508. A clear recognition of the novelty and fundamental nature of this doctrine has led some courts to deny flatly the existence of any duty to answer notices of forged notes. British Linen Co. *v.* Cowan (1906) 8 F. (Scot. Sess. Cas.) 704. The result in this whole class of cases is sometimes claimed to be merely an instance of sleeping on one's rights. Without inquiring into the application of that equitable doctrine to legal rights, the case of a forged note will not suffer that explanation since no right will ever be asserted by the person estopped.

[7] A typical case is the rescue of a child from an approaching train. Eckert *v.* Long Island Ry. Co., *supra*.

[8] In Dominion Bank *v.* Ewing, *supra*, the court required a telegram rather than a letter, but even this seems doubtful. See 18 HARV. L. REV. 140, 148; 22 *id.* 112, 113.

[9] See cases *supra*.

[10] The injustice of the other result, however, has led some courts to disregard this

defendant may thus be required to pay may be much more than what he actually caused. If the result is unjust, it seems that estoppel should not be allowed to create a remedy, at least if there is some other relief possible.[11] It is submitted that the true solution is to abandon the language of estoppel and to allow an action analogous to deceit.[12] The defendant by his silence, when it was his duty to speak, has caused the plaintiff to be misled to his injury. Even the jurisdictions that insist on applying the principle of *Derry* v. *Peek* [13] would have no difficulty with this, as the defendant, by hypothesis, is aware of all the facts. His intent in keeping silence is of no consequence.[14] This remedy insures a just assessment of damages in each case, and, if the analysis of the decisions has been correct, it merely enforces legal obligations already recognized.

THE RIGHT TO APPEAR ON THE BALLOT UNDER THE PARTY NAME. — The right of individuals or groups to make exclusive use of a party name, or hold a position in the party organization, was not recognized at common law.[1] But universal statutes in this country make the nomination by a party a condition precedent to the right to appear on the official ballot under the party name.[2] In determining this right the courts must necessarily decide who is in fact the regular nominee of the party.[3] The custom of the party in the absence of specific legislative provision is the only test of regularity.

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difficulty. A late New Hampshire case contains an excellent discussion of this. See Conway National Bank *v.* Pease, 82 Atl. 1068, 1074, 1076 (N. H.).

[11] Fall River National Bank *v.* Buffinton, 97 Mass. 498. See Ogilvie *v.* West Australian Mortgage and Agency Corporation, Limited, [1896] A. C. 257, 270. This is not the only instance in the law where the remedy by estoppel is arbitrary and unjust. See EWART, ESTOPPEL, 226 *et seq.*

[12] Two cases seem to have been decided on this theory. The form of the action does not appear, but only the damages were recovered rather than the total value of the *res* nominally concerned. Commercial National Bank *v.* Nacogdoches Compress and Warehouse Co., 133 Fed. 501. See *In re* Romford Canal Co., 24 Ch. D. 85, 92, 93. An interesting analogy to this is found in a recent case which enjoined ejectment until the owner of the land had reimbursed in full one who had expended money on the land under a parol license. The right in the licensee to recover the money expended rather than the value of the alterations to the licensor is the conspicuous feature of this case. Johnson *v.* Bartron, 137 N. W. 1092 (N. D.).

[13] L. R. 14 A. C. 337.

[14] Foster *v.* Charles, 7 Bing. 105.

[1] McKane *v.* Adams, 123 N. Y. 609, 25 N. E. 1057; Kearns *v.* Howley, 188 Pa. St. 116, 41 Atl. 273. If the election of party delegates or committees is regulated by statute, the courts will give effect to a valid election in a primary. Walling *v.* Lansdon, 15 Idaho, 282, 97 Pac. 396, 402.

[2] For a short history of the ballot laws, see Matter of Madden, 148 N. Y. 136, 139, 42 N. E. 534, 540.

The statutes vary greatly in detail in the different states, and tend to-day to become more complex. But in their outlines they are substantially similar, and it seems that the conflicting decisions are often due rather to a difference in principle than to the words of the statutes on which the courts are eager to distinguish opposing cases. It must always be remembered, however, that general principles are likely to be replaced in any particular case by a legislative provision.

[3] It has often been said that this is a political and not a judicial question. This sometimes means, apparently, that the courts will follow the decision of a party tribunal. Davis *v.* Hambrick, 22 Ky. L. Rep. 815, 818, 58 S. W. 778, 780; Potter *v.*